Petition

No. 81-1949

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1981

UNIROYAL, INC.,

Petitioner,

v.

J. WYATT SKAINES, d/b/a
WYATT TIRE DISTRIBUTORS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Questions Presented

I. In a Robinson-Patman price discrimination case, in view of *J. Truett Payne* v. *Chrysler*, may verdicts be permitted awarding as damages either—

(a) calculated differentials in prices charged to plaintiff and to his competitor; or

(b) lost *future* profits based solely on an annual profit estimated—but never attained—and then projected over plaintiff's business life expectancy?

II. In remitting all but $30,000 of a $205,600 special verdict (before trebling), did the Court of Appeals err by failing to remand for reconsideration by the District Court the award of $106,250 for attorneys' fees originally rendered in view of the trial result?

III. Does proof of physical, warranty, product line components, quality grades, marketing and advertising, as well as brand name, differences between the product line sold to a plaintiff and those sold his competitor, establish, as a matter of law, that the goods were *not* of "like grade and quality" and, hence, beyond Robinson-Patman purview?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Orders Below and Jurisdiction

Petitioner Uniroyal, Inc.* seeks review of the Order of the United States Court of Appeals for the Sixth Circuit filed on December 1, 1981 which affirmed a special verdict for price differentials and modified another verdict granting lost future profits as further damages to the respondent.

* Uniroyal, Inc., formerly United States Rubber Company, is a public corporation with both common and preferred stock outstanding and trading on the New York Stock Exchange. Uniroyal has no corporate affiliates or subsidiaries within the purview of this Court's Rule 28.1.

Cross-petitions for rehearing were denied (with some modification of the original order) by that Court on January 22, 1982. Neither order has been officially reported; the amended order on rehearing is appended to this petition.

This Court's jurisdiction to review proceeds from 28 U.S.C. § 1254(1).

Statutes Involved

15 U.S.C. § 13(a), part of the Robinson-Patman Act, reads in pertinent part as follows:

> It shall be unlawful for any person engaged in commerce, . . . to discriminate in price between different purchasers of commodities of like grade and quality, . . . where such commodities are sold for use, consumption or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .

Section 4 of the Clayton Act, 15 U.S.C. § 15, in part, provides:

> Any person who shall be injured in his business or property by means of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Statement of the Case

This case presents relatively straightforward questions of liability and damage under the Robinson-Patman Act amendments to Section 2 of the Clayton Act, 15 U.S.C. § 13.

Respondent Skaines filed his action against petitioner Uniroyal in the Western District of Tennessee as, in effect, a countersuit to a state court action initiated (and eventually won) by Uniroyal to collect an open account balance. His complaint drew upon matter presented earlier in *Brewer* v. *Uniroyal, Inc.*, 498 F.2d 973 (6th Cir. 1974).

In June, 1968 Skaines, who earlier had been employed in various capacities by Uniroyal, became sole distributor in the Memphis area of Peerless brand passenger and truck tires marketed by Uniroyal's Allied Brands Division. He commenced operations as Wyatt Tire Distributors with a $10,000 investment and a $20,000 (later $30,000) inventory credit from Uniroyal. The business closed in March 1970. His tax returns for both of his two fiscal years reflected losses; yet he withdrew $9,200 in cash.

During Wyatt Tire's 21-month life, and specifically commencing in mid-August, 1969, one Harold Friend was retained by Uniroyal to organize and manage an experimental effort to improve wholesale distribution in several southwestern markets of Uniroyal's Uniroyal and Guardian tire lines. Friend's first—and, as it developed, only—operation was set up in Memphis. The corporate vehicle for this effort was United Tire & Rubber Company ("United") which commenced business in mid-August 1969 and operated in-

dependently until acquired outright on October 20, 1969 by Uniroyal. Uniroyal thereafter operated United as a wholly-owned subsidiary, terminating any further question of Robinson-Patman liability. See *Parrish* v. *Cox*, 586 F.2d 9 (6th Cir. 1978) and *Security Tire & Rubber Co.* v. *Gates Rubber Co.*, 598 F.2d 962 (5th Cir. 1979), *cert. den.*, 444 U.S. 942 (1979).

For purposes of this petition, it will be conceded, *arguendo*, that during its eight or nine weeks of independent existence, United bought Uniroyal and Guardian tires from Uniroyal's Tire Division at prices below those charged Wyatt Skaines by its Allied Brands Division for its Peerless line. It is further stipulated that the calculated aggregate of such pricing differences came to $16,969.00.

At trial, Skaines necessarily contended that the Peerless tire line which he handled was of "like grade and quality" with the Uniroyal/Guardian lines with which United dealt. Insofar as presently relevant, he further contended that the price discrimination resulted in the following damage claims:

A.	Profits lost through sales "diverted" to United	$ 3,476.07
B.	Price differentials	16,969.00
C.	Lost future profit (as reduced by the trial court)	336,400.00

Special verdicts were taken with respect to each of these categories over Uniroyal's objection that Theory B represented "automatic" damages rather than "actual" damage as mandated by the Sixth Circuit in *Kidd* v. *Esso Standard*

Oil Co., 295 F.2d 497 (1961) and by *Enterprise Industries, Inc.* v. *Texas Company*, 240 F.2d 457 (2d Cir. 1957), *cert. den.*, 353 U.S. 965 (1957) and that Theory C introduced to Robinson-Patman litigation a novel "theoretical/hypothetical" damage theory.

The jury's verdicts, as confirmed through denial of all Uniroyal's post-trial motions by the trial court and as described in the Sixth Circuit's "Amended Order" (Appendix 3a), were as follows:

Diverted Sales	$ 1,150.
Price differentials	16,969.
Lost future profits	205,200.

The District Court trebled the aggregate of the three special verdicts, summarily added an attorney fee award of $106,250 and directed entry of judgment in respondent Skaines' favor for $776,207.00.

Uniroyal appealed on two principal grounds. First, it contended that the trial record conclusively established that the Uniroyal/Guardian tire lines were not of "like grade and quality" as Peerless tires; hence the case should have been dismissed as insufficient in law. Secondly, Uniroyal contended that the better considered views of circuit courts which had addressed the question (including the Sixth Circuit in *Kidd, supra*) had fashioned the so-called "actual"—as opposed to "automatic"—damage rule in price discrimination cases and that virtually all circuits had warned against speculative damages represented in this case by the award of lost future profits.

Finally, Uniroyal pointed out that reversal or a substantial modification of the judgment should void, or require remand of, the counsel fee awarded below.

During the briefing process below, this Court granted certiorari in *Chrysler Credit Corp.* v. *J. Truett Payne, Inc.*, 607 F.2d 1133 (5th Cir. 1979). Uniroyal cited this development in its reply brief and, when its appeal was scheduled for argument, by formal letter pursuant to Sixth Circuit practice, drew that court's attention not only to this Court's decision last May in that case, *sub nom. J. Truett Payne Company, Inc.* v. *Chrysler Motors Corporation*, No. 79-1944, but to three circuit court decisions which had already had occasion to apply, or comply with, this Court's instruction.

At argument, the Sixth Circuit panel indicated little interest in the like grade and quality point and quickly directed the discussion to *Payne's* meaning for this case and, particularly, to the question of lost future profits inasmuch as the "automatic" price differential issue had been squarely rejected in *Payne* resolving all prior conflicts among the circuits on that point. Seemingly, the panel was prepared to direct reversal in this case as well.

However, on December 1, 1981, the panel filed its six-page order signed by the court's clerk. After cross-motions for rehearing, this order was modified somewhat without change in its dispositive conditions. Thus, the Court of Appeals upheld the trial court's submission to the jury of the like grade and quality issue and of all three special damage theories, actual, automatic (price differentials) and hypothetical/theoretical (lost future profit). The

Court, with little explanation except to cite the "paucity" of supporting evidence, did remand with provision for remittitur of the lost future profit verdict from $205,200 to $30,000. Appendix 5a. However, despite this drastic (75%) reduction, the $106,250 attorney fee award was sustained, again without comment, and now stands against aggregate single damages of $48,119.

It is submitted that this case uniquely presents issues governing private Robinson-Patman enforcement. While the dollars may not seem large, it remains that Wyatt Skaines may collect $250,000 on a net investment of less than $1,000 because of a perceived short term violation of a technical statute of questionable application.

As the patent errors below relate to damages, those questions are presented first. Uniroyal's contention as to appropriate standards of proof of "like grade and quality" follow.

Reasons to Grant the Writ

I

Damages Affirmed Below Conflict with this Court's Damage Rule for Robinson-Patman Cases.

A. Price Differentials Alone May Not Serve as "Automatic Damages".

In *J. Truett Payne Company, Inc.* v. *Chrysler Motors Corp.*, —— U.S. ——, 101 S.Ct. 1923, 68 L.Ed.2d 442, this Court, less than a year ago, ruled definitively that mere proof of the extent of unlawful discriminatory pricing does not establish "automatic damages" under § 4 of the Clayton Act.

This decision, one would have thought, mandated reversal of at least the special verdict accepted by the trial court for $16,969 in calculated price differentials between the Peerless tires supplied to Skaines and the Uniroyal/Guardian lines supplied to United. Indeed, the Fifth Circuit in *Payne*, 607 F.2d 1133, had reversed just such a verdict and Justice Rehnquist's opinion can only be read as full approval.

In thereafter sustaining such a verdict in this case, the Sixth Circuit panel has unjustly fastened a trebled liability upon petitioner. Of greater concern is the threat of emasculation in practice of this Court's clear instruction on damage in Robinson-Patman cases. So blatant is that panel's disregard for *Payne** as to merit, we venture to suggest, the grant of certiorari and summary reversal pursuant to Rule 23.1 of this Court's Rules.**

In denying rehearing, the panel inserted these lines:

> We interpret *Payne* to mean that proof of injury must be submitted from which, under proper instructions, a jury may find damage. Such an award may perhaps not be in the actual dollar amount of damage suffered, but because it is based on proof of injury and has been specifically found to be damage by the jury, cannot be characterized as automatic. A jury verdict so based is consonant with *Payne*. (Appendix 6a)

The panel then revised its penultimate paragraph to label as "specific" the three damage elements it approved. Appendix 5a.

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* "Appellant contends that the recent Supreme Court decision [in *Payne*] limits a plaintiff's recovery to actual damages. We do not agree." Appendix 3a. The panel's disagreement, of course, extends to that Circuit's prior decision in *Kidd* v. *Esso Standard Oil Co.*, 295 F.2d 497 (1961).

** Rule 23.1: After consideration of the papers distributed pursuant to Rule 22, the Court will enter an appropriate order. The order may be a summary disposition on the merits.

It remains, however, that, under *Payne*, price differentials are not permissible evidence of injury or damage. No "proper" jury instruction may allow a jury to award price differentials as damages. Nor does the panel suggest how a "proper" instruction is to be framed "consonant with Payne." It also remains that the panel, despite *Payne*, has sustained the trial court's *improper* charge and the resultant special verdict awarding, as damages, the calculated ("specific") price differentials claimed by Skaines as his due—i.e., "automatic"—damages.

Clearly the Sixth Circuit affirmance of the special verdict for "specific" price differentials is an aberration. Other circuits have readily accommodated to, and applied, the *Payne* rule in various contexts. See *Allen Pen Company* v. *Springfield Photo Mount Company, Inc.*, 653 F.2d 17 (1st Cir. 1981); *Interstate Cigar Co., Inc.* v. *Sterling Drug Inc.*, 655 F.2d 29 (2d Cir. 1981); *O. Hommel Co.* v. *Ferro Corp.*, 659 F.2d 340 (3rd Cir. 1981); *Malcolm* v. *Marathan Oil Co.*, 651 F.2d 1016 (5th Cir. 1981); *Vanco Beverages, Inc.* v. *Falls City Industries, Inc.*, 654 F.2d 1224 (7th Cir. 1981).

Indeed, upon remand of *Payne*, the Fifth Circuit considered the evidence of violation equally faulty and finally dismissed the case outright. —— F.2d ——, 1982-1 Trade Cas. ¶ 64,615.

Surely, this aspect of this case warrants summary reversal.

B. "Lost Future Profits" of $30,000 Are Impermissibly Speculative in Light of the Special Verdict for Actual Damage of $1,150.

While *Payne* addressed specifically the question of price differentials as automatic damage, the matter of lost future profit, as handled—or mishandled—below, also merits review.

Robinson-Patman jurisprudence offers no recorded case of an award of lost future profits. With *Payne*, damage analysis in such cases now begins and ends with this Court's command to ascertain *actual* damage, the kind of damage attributable to antitrust injury. To predicate such damage on a proprietor's business life expectancy moves somewhere beyond speculation into sheer caprice. Skaines happened to be forty when United became his competitor, yielding a 25-year expectancy to retirement. Had he been in his sixties, under his own theory he would have lost little in the way of future profit. But suppose he had been only 25 . . .?

This is not the stuff of reasonable estimation long recognized (and adverted to in *Payne*) as permissible in Sherman Act cases where the monetary damage is often imprecise. See, *e.g.*, *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946).

Skaines' theory is analogous to compensating negligence victims for permanent disability. Yet the business disability, if any, inflicted on Skaines lasted only a few weeks. Skaines claimed *actual* damage—for diverted sales—of less than $3,500; the jury awarded him $1,150 (before trebling).

Thus has Skaines been compensated for his temporary disability.

The evidence as to loss of future profits was so speculative and uncertain as to be totally insufficient as a matter of law to support *any* award for lost future profits. The only evidence in this respect, a first year budget which projected a "net profit before taxes" of $13,456, was coupled with Skaines' bald assertion that, but for Uniroyal's alleged unlawful conduct, he would therefore have made profits of $13,456 per year for 25 years, after excluding (at the trial court's direction) his managerial withdrawals of $9,000 per year.

This proof was deficient in that the budget was no more than an educated guess, prior to entry into business, of attainable results during first year operations of an untested entrepreneur. There was no evidence as to Skaines' profit-making ability in any other business from which the credibility of the projection could be judged; there was no proof of profit performance of any comparable business in the Memphis market; and, in fact, Skaines had a loss in his first year which ended before United started in business and, thus, before any of the claimed discrimination occurred.

Nor was there evidence that Skaines would have continued in business for 25 years, a necessary predicate to finding loss of profits over that period of time. On the contrary, since his Peerless franchise was, by its express terms, terminable by either party upon 30 days' written notice, there was just no basis for believing the business would continue for a generation.*

* On remand in *Payne*, the Fifth Circuit rejected, as a damage concept, expert testimony as to going concern values projected for 20 years. 1982-1 Trade Cas. at pages 73,377-8.

Assuming, but not conceding, that lost future profits, *per se,* may be recovered in a Robinson-Patman action, there still must be sufficient evidence from which the amount of lost profits can be determined with a fair and reasonable degree of certainty, without speculation or conjecture. *Webb* v. *Utah Tour Brokers Ass'n,* 568 F.2d 670, 677-678 (10th Cir. 1977); *Associated Press* v. *Taft-Ingalls Corp.,* 340 F.2d 753, 769 (6th Cir. 1965); *Elder-Beerman Stores Corp.* v. *Federated Department Stores, Inc.,* 459 F.2d 138, 150 (6th Cir. 1972); *Coleman Motor Co.* v. *Chrysler Corp.,* 525 F.2d 1338, 1351-1352 (3rd Cir. 1975). In *Volasco Products Company* v. *Lloyd A. Fry Roofing Company,* 346 F.2d 661, 666 (6th Cir. 1965), *cert. den.,* 382 U.S. 904 (1965), the mathematical projection at issue was based on the plaintiff's prior business history, unlike the projection in the instant case, which is totally conjectural.

To award antitrust damages based on projected profits, there must, at the least, be a tangible foundation from which the fact finder can determine that a reasonable probability exists that profits would have been made. *Webb, supra,* 568 F.2d at 677. A mere estimate of lost profits cannot be sufficient in this respect, especially where (as in the instant case) there never were any profits. See *Baush Machine Tool Co.* v. *Aluminum Co. of America,* 79 F.2d 217 (2d Cir. 1935).

In *Albrecht* v. *Herald Company,* 452 F.2d 124 (8th Cir. 1971), the Court, at 131, stated:

> Certainly the anti-trust laws in dealing with damages are not intended to give a person a life annuity in addition to whatever actual damage a party might have

> suffered in its business property. *The injury is to the business and not to the person.* (Emphasis supplied.)

In *Simpson* v. *Union Oil Company of California*, 411 F.2d 897 (9th Cir. 1969), *rev'd on other grounds*, 377 U.S. 13 (1969), the trial court's disallowance of lost future profits based on the plaintiff's projection of earnings over his life expectancy was affirmed because the plaintiff there, as with Skaines here, had not been personally disabled or otherwise rendered unable to earn an income for his remaining life.

Should this Court be inclined to hold lost future profits recoverable in price discrimination cases—and we are unaware of any Robinson-Patman action where a jury was allowed to award lost future profits—permit us to note, without citation, that, even in Sherman Act termination cases, virtually every award has been limited, with rare exception, to three years or less.

In the instant case, Skaines' claim for lost future profits, as submitted to the jury, was $336,400, and the jury award was $205,200. Since the District Court did instruct the jury to discount damages for lost future profits to present value, it appears that the jury based its award on something approaching 25 years. The appellate panel gave no grounds for its decision to reduce this verdict, in effect, to $30,000.

The fundamental and fatal error lay in inviting the jury to speculate on anything as irrational as a 25-year life expectancy in the first place. No part of an award proceeding from such induced speculation should be allowed to stand. Again, summary reversal is merited.

C. The Attorney Fee Award Should Have Been Remanded to the District Court.

The District Court, without a hearing or any evidence or comment from petitioner, summarily awarded respondent $106,250 as his "reasonable attorney's fee" under Clayton Act, § 4, for obtaining the special verdicts which, when aggregated and trebled, came to $669,957.

The Court acted upon respondent's submission of the total time of counsel in prosecuting the case and the affidavits of several Memphis trial attorneys to the effect that, *in view of that result*, an appropriate fee award should range from $125,000 to $150,000. The actual award represents $135 per hour claimed for both lead and substituted counsel and for the former's trial associates.

But respondent's liability awards have now been reduced by the panel's remittitur to $48,119 or $144,357 when trebled, a reduction of $525,600. Nevertheless, the panel left the fee award undisturbed. This obvious inequity is also readily correctible by summary remand to the District Court for reconsideration irrespective of whether this Court accepts for present review the issues of either automatic damage or lost future profit or of both.

II

Whether Commodities Are of "Like Grade and Quality" Should Be a Question of Law.

Skaines' "proof" on the like grade and quality issue lay entirely in the undisputable assertion that passenger tires (of the same size) may be interchangeable. The issue was put to the jury, over objection, and the trial court quite obviously agreed with the resultant finding of liability in its denial of post trial motions.

The Sixth Circuit also agreed with, it is submitted, a most disingenuous summary of the trial record:

> . . . the jury concluded that the tires that were supplied to United were of like grade and quality as those supplied to Skaines, albeit they were sold in some instances under different labels . . . Appendix 2a.

In fact, the record not only uniformly reflects that the labels were different in all cases, but that each tire in each line was separately designed, resulting in appreciable physical differences in overall weight, tread width and groove depth, tread design and virtually all other variables in a tire's construction.* The lines were produced in different plants from different molds and distributed through separate marketing organizations. Moreover, the Uniroyal/Guardian tires were both warranted and nationally adver-

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* An example cited to the Circuit Court from Exhibits 117 and 155: For size G78-14 permaglass tires, the Peerless Premium with overall weight of 25 lbs. 7 oz., tread weight 12 lbs. 13 oz. and groove depth of .42″ contrasted with the Uniroyal Fastrack of 22 lbs. 15 oz., 11 lbs. 6 oz. and .355″ and the Guardian Premium of 26 lbs. 12 oz., 13 lbs. 7 oz. and .390″.

tised by Uniroyal while Peerless tires were sold without consumer warranty or advertising support.

Within the lines there were further differences. The truck tires, perhaps a fourth of Skaines' purchases, were conceded by plaintiff's expert to be different. The Peerless line included sport (or GT) tires; the Uniroyal line did not. Finally, United purchased truck load quantities of cosmetically blemished tires traditionally recognized in the industry as deserving of discounts. Truck load quantities of "blems" were not available at the time in the low volume Peerless line. (Of course, the discount marketing of "blems" or "factory seconds" or "second line" or other "off-spec" commodities is not limited to the tire business.)

None of this evidence was adverted to in the reviewing panel's orders affirming liability.

The real issue, not previously addressed by this Court, is whether uncontradicted evidence of this nature is sufficient basis for determination, *as a matter of law*, that the different pricing of product lines so distinguished can not constitute unlawful price discrimination violative of the Robinson-Patman Act? If juries are to be permitted to find to the contrary as a matter of fact, the stakes may become too high for manufacturers who might otherwise intensify their competitive efforts through "multi-lining" their principal products, hardly a desirable goal of Robinson-Patman enforcement.*

* Is General Motors at risk in marketing Oldsmobiles at prices below or above those charged for Buicks or Pontiacs? See *Checker Motors Corp.* v. *Chrysler Corp.*, 283 F.Supp. 876, *aff'd*, 405 F.2d 319 (2d Cir. 1969), *cert. den.*, 394 U.S. 999 (1969).

In a notable Federal Trade Commission proceeding, two lines of bathtubs made from identical raw materials, with the same manufacturing process, in the same factories, for the same end use, were found not to be of like grade and quality because of variations in size, design and styling, *e.g.*, linear differences in height, width and water level and in the enameled area. *In re Universal-Rundle Corporation*, 65 F.T.C. 924 (1964), *rev'd on other grounds*, 352 F.2d 831 (7th Cir. 1965), *rev'd*, 387 U.S. 244 (1967), *decision on remand*, 382 F.2d 285 (7th Cir. 1967).

At 955, *id.*, the Commission stated:

> Counsel's argument . . . is that physical differences which enhance the marketability of a product are not of sufficient importance to change or affect the grade or quality of that product since the Commission has held in the *Borden* case that branded and unbranded goods were of like grade and quality even though the branded article was regularly marketed at a higher price than the unbranded one. We find no merit in this argument. In the *Borden* case the compared products were physically identical and sold at different prices. Here the products are physically different and sell at different prices. The only similarity between the two cases is that the products compared in each sell at different prices.
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> * * *
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> . . . the holding in *Borden* related only to a comparison of intrinsically identical products. That case held that differences in brands affecting consumer preference or marketability of such products could be disregarded in applying the "like grade and quality" test. *It does not support the contention . . . that physical differences in products which affect consumer preference or maketability can also be disregarded.*

> Such an interpretation of the statute would ignore the physical test of like grade and quality and bring within the purview of Section 2(a) transactions involving goods which may be of completely different grade or quality. The argument . . . is therefore rejected. (Emphasis supplied.)

Thus, one can fairly doubt that the F.T.C.'s earlier *Borden* decision, 64 F.T.C. 534, would have prevailed had Borden's private label milk differed in, say, butterfat content from its Borden brand. See *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 184 F.Supp. 312, 314 (N.D. Ill. 1960), *aff'd*, 287 F.2d 265 (7th Cir. 1961), *cert. den.*, 368 U.S. 829 (1961); cf. *Atalanta Trading Corp.* v. *F.T.C.*, 258 F.2d 365 (2d Cir. 1958); *In re Quaker Oats Co.*, 66 F.T.C. 1131, 1192 (1964).

In its review of the *Borden* case, this Court took particular care to stress that Borden brand milk and its private label counterpart were "physically and chemically identical." See 383 U.S. 637, 638 (1965).* With that explicit reservation, the Court upheld the Commission's view that brands or labels could not, alone, differentiate products as to grade or quality.

It may also be that differences between warranties of identical products, again standing alone, cannot justify price discrimination. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 376 F.2d 692, 703 (7th Cir. 1967), *rev'd on other grounds*, 392 U.S. 134 (1968). Here, however, Peerless tires were sold with *no* consumer warranty while Uniroyal/Guardian tires were fully warranted (even as to

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* The point is stressed again in the text at 643 and 644 and in footnote 5; see, also, the dissent at 648.

road hazards). Thus, the factory warranted consumer arguably received something of extra value—or different—with his tire purchase.

Be that as it may, the question so carefully reserved in *Borden*—and earlier avoided in *Moog Industries* v. *F.T.C.*, 355 U.S. 411 (1958)—is here presented with the myriad of actual physical and marketing differences in petitioner's brands of products sold simultaneously to Skaines and to United.*

This Court has had occasion, in addressing §2(f), to caution against construing the Robinson-Patman Act in manners that may "give rise to a price uniformity and rigidity in open conflict with the purposes of other anti-trust legislation." *Automatic Canteen Co.* v. *F.T.C.*, 346 U.S. 61, 63 (1953). An obvious complement to that concern lies in reserving the question of like grade and quality as one of law for the Court, rather than have juries assailed with tires-are-tires, ham-is-ham, oats-are-oats rhetoric.

It is submitted that the issue, of obvious importance to an effective—and consistent—antitrust policy, should be considered and resolved by this Court.

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* In *Brewer* v. *Uniroyal, supra*, 498 F.2d 973, there was little issue of "like grade and quality"; Brewer dealt in the Uniroyal/Guardian lines that United handled.

Conclusion

For the reasons stated, the questions presented merit review by this Court by grant of a writ or by summary disposition.

Respectfully submitted,

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April 21, 1982

Appendix

APPENDIX

Amended Order Filed January 22, 1982

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 80-1329

J. WYATT SKAINES, individually and d/b/a WYATT TIRE DISTRIBUTORS,

Plaintiff-Appellee,

v.

UNIROYAL, INC., formerly UNITED STATES RUBBER COMPANY,

Defendant-Appellant.

Before:

EDWARDS and MARTIN, Circuit Judges and FEIKENS, District Judge*

Uniroyal, Inc. ("Uniroyal"), defendant below, appeals from a jury verdict of $223,319 for price discrimination in violation of § 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). This verdict was trebled pursuant to § 4 of the Clayton Act, 15 U.S.C. § 15, and with the award of attorneys' fees in the amount of $106,250, the total recovery of Skaines, plaintiff below, was equal to $776,207; judgment

* The Honorable John Feikens, Chief Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

was entered thereon by the United States District Court for the Western District of Tennessee.

On June 24, 1968, Skaines entered into a "Peerless Distributor Franchise Agreement" with Uniroyal concomitantly with a book balance plan.* Prior to entering the agreement with Uniroyal, Skaines drew up a worksheet with three sales representatives of the tire company to project expenses and profits for the business for the year between July 1, 1968 and June 30, 1969. The "Financial and Operating Budget" anticipated a total annual income before taxes for the first year of $22,456.

The venture did not succeed and this lawsuit ensued in which Skaines claimed price discrimination by Uniroyal as a cause. He claimed tires were being sold by Uniroyal to him at a higher price than to United Tire & Rubber Company ("United"), another tire distributor in Memphis. Upon trial the jury concluded that the tires that were supplied to United were of like grade and quality as those supplied to Skaines, albeit they were sold in some instances under different labels, and found price discrimination. A verdict was returned for Skaines.

Uniroyal moved for judgment notwithstanding the verdict, or in the alternative for a new trial. The standards for review of the motions are similar but not identical. To determine if a judgment notwithstanding the verdict is proper, the evidence must be viewed in the light most favorable to the party that secured the jury verdict and reasonable minds must not differ as to the conclusions to be drawn from the evidence. *Woodruff* v. *Tomlin*, 616 F.2d 924, 934 (6th Cir.), *cert. denied*, 449 U.S. 888 (1980); *Gil-*

* Under this plan, Skaines was required to contribute $10,000 to the venture and Uniroyal supplied a $20,000 tire inventory.

ham v. *Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976). In this case, there was sufficient question as to whether the tires were of like grade and quality to require a determination by a trier of fact. The decision of the District Court denying Appellant's motion for judgment notwithstanding the verdict is affirmed.

On appeal, the reviewing court must only reverse the District Court's denial of a new trial if it appears that that court abused its discretion. *Duncan* v. *Duncan*, 377 F.2d 49 (6th Cir. 1967). In this instance, the District Court concluded that there was overwhelming evidence from which a jury could conclude that there had been a violation of the Robinson-Patman Act, even though it was of very short duration. Since the District Court had the benefit of hearing testimony that was presented in this case, as did the jury, we are not inclined to overturn its ruling that the verdict was not against the great weight of the evidence. Nor do we find error in the jury instructions pertaining to the element of "like kind and quality." The decision of the District Court denying Appellant's motions for a new trial on these issues is affirmed.

Having found liability for a violation under § 2(a) of the Robinson-Patman Act, we turn to the question of damages. The jury awarded Skaines, in special verdicts, $1,150 for diverted sales, $16,969 in price differentials, and $205,200 in lost future profits. Appellant contends that the recent United States Supreme Court decision, *J. Truett Payne Co., Inc.* v. *Chrysler Motors Corp.*, 49 U.S.L.W. 4516 (May 18, 1981), limits a plaintiff's recovery to actual damages. We do not agree. The *Payne* decision states that damages are not presumed to result from a Robinson-Patman viola-

tion and, thus, "automatic" damages are not recoverable. It further holds that damage to a business is not, in and of itself, proof of a violation of § 2(a) of the Robinson-Patman Act. We interpret *Payne* to mean that proof of injury must be submitted from which, under proper instructions, a jury may find damage. Such an award may perhaps not be in the actual dollar amount of damage suffered, but because it is based on proof of injury and has been specifically found to be damage by the jury, cannot be characterized as automatic. A jury verdict so based is consonant with *Payne*. In so holding, the court in *Payne* relied on cases in which future profits were awarded as the result of Sherman Act violations and looked to the evidence presented by Payne in support of his claim of future profits.

The concept of recovery for lost profits is not without precedent. The statute that provides for recovery of treble damages does not distinguish between Sherman Act violations and Robinson-Patman Act violations. 15 U.S.C. § 15, Clayton Act § 4. An individual who is forced to close his business may recover lost future profits if he can show that the defendant's antitrust violation was the reason that the business was damaged. *Malcolm* v. *Marathon Oil Co.*, 642 F.2d 845, 862 n.28 (5th Cir. 1981); *Lehrman* v. *Gulf Oil Corp.*, 464 F.2d 26, 45-47 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972); *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, 421 F.2d 61, 81 (1st Cir. 1970). However, while the amount of damages is not subject to a rigorous degree of proof, *Payne, supra*, at 4519; *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U.S. 100, 123-24 (1969); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S.

555, 561-66 (1931), a plaintiff cannot be awarded damages that are purely conjectural and speculative. *Bigelow, supra,* at 264; *Lehrman, supra,* at 46. The problem that we face in this case is similar to that faced by the courts in *Farmington Dowel, supra,* at 81, *Lehrman, supra,* at 45, and *Hanson* v. *Pittsburgh Plate Glass Industries, Inc.,* 482 F.2d 220, 227 (5th Cir. 1973), *cert. denied,* 414 U.S. 1136 (1974). In all instances, the jury was asked to speculate on the length of time that a plaintiff would have had a thriving business in the absence of the antitrust violation when the evidence only showed that the plaintiff lost money during the entire time of his venture. In the case before us, we are of the opinion that the amount of the jury award is not sufficiently supported by the evidence. The only data presented by Skaines in support of his claim for future profits is that contained in the Financial and Operating Budget for the year 1968-69 and his statement that he expected to stay in business until he retired 25 years later at the age of 65. The fact that Skaines contended that the business realized sales greater than $25,000 for the first year of business in the face of income tax returns that showed a net loss for the two fiscal years that he was in business does not help his position. Although we do not substitute our judgment for that of the jury, the paucity of the evidence to support such a large verdict is apparent. For these reasons, we remand to the District Court for entry of an order of remittitur. Unless Appellee agrees to remit $525,600 within thirty days of the entry of the order, the District Court should grant a new trial limited to the issue of damages. This finding means that the Appellee is awarded in specific damage for diverted sales $1,150; in specific damage for price differentials $16,969; and in specific damage

for lost future profits $30,000—all totalling $48,119. When the damages are trebled, Skaines will be entitled to receive $144,357 in damages and $106,250 attorneys' fees.

Accordingly, the decision of the District Court is affirmed in part and reversed and remanded in part for actions consistent with the decesion of this court on damages.

ENTERED BY ORDER OF THE COURT

/s/ JOHN A. HEHMAN
Clerk

Dated:

Opposition

Office Supreme Court, U.S.
FILED
MAY 24 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1949

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

UNIROYAL, INC.,

Petitioner,

v.

J. WYATT SKAINES, d/b/a
WYATT TIRE DISTRIBUTORS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether this Court should review a federal court of appeals decision of a federal question that is in accordance with the decisions of this Court.

II. Whether in a Robinson-Patman price discrimination case, a jury may award damages that directly and proximately resulted from price discrimination which destroyed competition and a dealer's business, including damages for —

(A) overcharges or price discriminatory differentials; and,

(B) loss of future profits based upon the manufacturer's projection of the dealer's profits and the business experience of the dealer.

III. Whether the issue of like grade and quality is a fact issue when the documentary evidence, expert testimony, former employees of the manufacturer and consumer preference confirm that the different labeled tires sold to the favored-competitor and the injured dealer were of like grade and quality as to performance, design, engineering specifications and consumer preference.

IV. Whether the lower Court abused its discretion by awarding $106,250.00 in attorney fees for legal services rendered during seven years of antitrust litigation pursuant to Section 4 of the Clayton Act.

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

UNIROYAL, INC.,

Petitioner,

v.

J. WYATT SKAINES, d/b/a
WYATT TIRE DISTRIBUTORS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ORDERS BELOW AND JURISDICTION

Respondent, J. Wyatt Skaines, seeks denial of Uniroyal's Petition for review of the Order of the United States Court of Appeals for the Sixth Circuit filed on December 1, 1981, and the amended Order filed on January 22, 1982. Respondent denies that this matter merits review by this Court's exercise of jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved are adequately set forth in the Petition.

COUNTER-STATEMENT OF THE CASE

A. Nature of the Case and Disposition by the United States Court of Appeals for the Sixth Circuit

Petitioner erroneously seeks this Court's review of a jury's finding of liability and award of damages for violations of §2(a) of the Clayton Act, as amended by the

Robinson-Patman Act. 15 U.S.C. §13(a).

Respondent was a franchised distributor of tires for Uniroyal. He claimed that Uniroyal violated the Robinson-Patman Act provisions of the antitrust laws by unlawfully discriminating in pricing and payment of consulting fees to a favored competitor (United Tire & Rubber Company), which resulted in the destruction of competition and his business. The jury returned special verdicts in favor of Respondent for an amount totalling $223,319.00. The District Court trebled the verdict to an amount of $669,957.00 and awarded attorney fees to the Respondent in the amount of $106,250.00 pursuant to §4 of the Clayton Act, 15 U.S.C. §15.

The United States Court of Appeals for the Sixth Circuit affirmed and modified by remittitur a special verdict awarding damages for loss of future profits.*

B. The Principal Parties and Goods

J. Wyatt Skaines was employed by Uniroyal for nine years. He worked for Uniroyal as: a management trainee; a district credit manager; a business manager and supervisor for the New Orleans district; a territory sales representative; a sales manager; and, an account manager for Uniroyal's Allied brands division.

He established and managed a Uniroyal tire dealership in Augusta, Georgia. He also established a wholesale division for a tire dealer in Little Rock, Arkansas, which sold Uniroyal's Allied brand labeled tires. Skaines was engaged in selling or merchandising Uniroyal tire products, either for the company or dealers, for a total of thirteen years.

Uniroyal manufactured and sold tires through two divisions, the Uniroyal division and the Allied brands division. The Uniroyal divison sold tires with Uniroyal, Tiger

*Uniroyal improperly claims that this cause of action was filed as a "counter-suit to a state court action". No reference to the state court action was permitted by the District Court.

Paw, Laredo, Guardian and Guardian Premium labels. The Allied brands division sold tires with the Peerless, Fisk and Gillette labels. Skaines had been involved with credit and sales for all of Uniroyal's different labeled tires.

C. Memphis Trade Area

In 1968 Shelby Tire Company sold the Uniroyal labeled tires on a retail basis in Memphis. Later in 1968, Thomas Brewer opened Brewer Tire Company and he primarily retailed the Uniroyal and Guardian labeled tires. Gillette labeled tires were being sold in Memphis by WECO Tire Distributors, which was owned by Uniroyal. No other Allied brand labels of Uniroyal tires were being sold by any other dealers in the Memphis trade area.

D. Partners for Profit Program

In 1968, Skaines discussed with C. V. Hinton, Uniroyal's regional sales manager for the Allied brands division, the possibility of going into the tire business with Uniroyal in Memphis. Skaines wanted the best priced tire line that Uniroyal had available. He was advised that the Peerless labeled tires were Uniroyal's most competitively priced label.

On June 11, 1968, a projection was prepared by Uniroyal's regional sales manager for Allied brands, the territory sales representative and accounts manager for Allied brands, and the district credit manager for Uniroyal. Skaines projected his expenses, but the other elements of the projection, i.e., projected sales and gross profits, were developed by the Uniroyal representatives. The projection forecasted a first year income for the business of $22,456.00. The draftsmen of the projection had combined management experience in excess of 50 years with Uniroyal tire dealerships and they agreed that the amounts reflected on the projection were reasonable.

On June 24, 1968, Skaines and Uniroyal entered into a

Peerless Distributor Franchise Agreement. The agreement was part of the "Partners for Profit" program, wherein Uniroyal licensed Skaines as an independent wholesale dealer. Uniroyal had tested this marketing concept with Uniroyal's WECO tire distributors in several markets.

On June 24, 1968, a book balance plan was entered into between Uniroyal and Skaines, wherein Uniroyal extended Skaines credit in the amount of $20,000.00. Skaines pledged to Uniroyal,

> a security interest on all 'company brand tires' manufactured and/or sold by Uniroyal, Inc., including: UNIROYAL, FISK, GILLETTE, GUARDIAN PREMIUM, GUARDIAN PREMIUM NYLON AND PEERLESS OR ANY OTHER BRAND NAME OWNED OR USED BY UNIROYAL, INC. NOW OR IN THE FUTURE.

Skaines was not limited by Uniroyal as to the labels of Uniroyal tires he could buy and sell.

Under the book balance plan, Uniroyal invested in the business by selling inventory on deferred terms. The dealer's consideration was to maintain the inventory at the minimum book balance amount and a $10,000.00 investment in the business. Skaines was accepted by Uniroyal for the program because of his excellent business management capacity and knowledge of the tire business, as well as the investment of his life savings.

Skaines' territory included Western Tennessee, Eastern Arkansas and Northwestern Mississippi. The tires Skaines purchased were manufactured by Uniroyal and sold to him in interstate commerce. He placed orders with Uniroyal at its regional office in Atlanta, Georgia.

E. Skaines' Performance and Growth

After starting business in July, 1968, Skaines realized sales in his first quarter of operation in excess of $25,000.00.

Sales steadily increased for each of the next three quarters to an amount in excess of $40,000.00. In the third quarter of 1969, the favored competitor started business and Skaines' closed his business in March, 1970. Skaines realized a profit from the business within his first four months of operation; however, he encountered inadequate inventory problems with Uniroyal. By April 1969, he again realized profitability in the business for three successive months, but he again had inadequate inventory problems with Uniroyal. The manufacturer admitted it failed to provide Skaines with a proper book balance for inventory, which was finally increased to $30,000.00 in August, 1969.

Uniroyal's failure to provide tires to Skaines caused him to lose sales due to the unavailability of merchandise. In an attempt to meet customer demands, he purchased tires in excess of $30,000.00 from WECO and other Uniroyal dealers since the company would not provide him with an adequate inventory. The three months of largest purchases by Skaines from the Memphis WECO dealership were in August, October and November, 1969, which were three of the first four months of business for the favored competitor, United Tire & Rubber Company ("United").

Respondent's business experienced net profits for six of the twenty months he operated in spite of: Uniroyal's inadequate extension of credit for the first 12 months of business; Uniroyal's failure to furnish inventory; and, head-on competition with Uniroyal's illegally priced-favored and commission-subsidized customer. In August and September, 1969, Skaines was able to realize profits, but the profits then were cut off with the entry into the Memphis market of Harold Friend's wholesale Uniroyal tire business, United.

F. Harold Friend's Agreement With Uniroyal

Unknown to Uniroyal's district and regional management, to Skaines, to Brewer, and to the Memphis WECO

management, early in 1969 Uniroyal's executive officers in New York were negotiating with Harold Friend to develop wholesale tire outlets in four cities in the United States. All of Friend's special billing prices were established and his orders placed with Uniroyal's executive officers in New York. In addition to the special pricing afforded to Friend, he was also paid $6,000.00 per month as a consultant for a nine and one-half month period of time, (August, 1969 through March, 1970).

Uniroyal's district and regional management officers admitted they had never known of any other Uniroyal dealer who received special prices and credit arrangements directly from the home office. Likewise, Brewer and Skaines were both unaware, during their twenty years of combined employment and association with Uniroyal, of any other Uniroyal dealer who received any consulting fees.

G. Uniroyal's Prior Knowledge of The Detrimental Effect of Friend's Operation on Competition With Other Uniroyal Dealers

Uniroyal's top management realized the detrimental impact Friend's "experimental wholesale program" would have on competition when Friend's program was discussed during a New York meeting, when one participant pointed out:

> . . . this type of outlet could interfere with our regular dealers in our retail stores, but Mr. Tully assured him that Friend's wholesale type of outlet would only be used where we had no distribution at the present time and that the prime purpose was to obtain entirely new distribution. (Pl. Ex. 15A5; R. 180, 859).

As of May 20, 1969, Friend planned to open his Uniroyal wholesale operation in El Paso, Texas; Shreveport, Louisiana; Lubbock, Texas; and, Memphis, Tennessee. On June 3, 1969, M. Harvey sent a telegram to Marvin Bruce,

president of Uniroyal's replacement sales:

> Upon further review, it is our recommendation that we not move with Harold Friend in the El Paso market at this time in view of signing Jim Yearwood early this year. Present indications are that Yearwood should purchase $150,000.00 in the first twelve months. Suggest we hold off with Friend until end of this year and give Yearwood a chance to develop. If he does not work out, then we would suggest we move on Friend program at that time. If you agree, we will inform Yearwood accordingly. (Pl. Ex. 15M, R. 845, 857-858).

Friend opened his Memphis outlet in the name of "United Tire & Rubber Company", ("United"), in August, 1969. He owned and operated the business through his firm, Tire Management Consultants, Inc. of Phoenix, Arizona. Skaines had been in business for one year and he, as well as Uniroyal's regional and district managers, had no prior knowledge of United's entry into the Memphis market.

Skaines, WECO, and Friend's United operation were competing in the same consumer market in the Memphis trade area and each was operated in the same manner. Both Skaines and United were located within several city blocks of downtown Memphis.

H. The Anticompetitive Effect of Uniroyal's Price Discrimination Advantages to Friend

In mid-August of 1969, Skaines became aware of United's presence in the market by receiving United's mailers and price sheets from his customers. United's advertised selling prices were below Skaines' carload shipment cost from Uniroyal. The price favoritism enjoyed by Friend in comparison to the purchase prices Skaines received from Uniroyal, ranged from ten to over fifty percent on each comparable tire of like grade and quality.

During twenty months of business Skaines purchased more than $155,000.00 worth of tires directly from Uniroyal and more than $30,000 worth from other Uniroyal dealers, including WECO. By comparing the purchase invoices of Skaines and United during the period when the two businesses were in direct competition, i.e., July 25, 1969 through March, 1970, Skaines' average cost per tire was $6.46 more than United's cost for a tire of like grade, quality and size. Skaines purchased 3,461 comparable tires resulting in price overcharges for this seven month period of $22,293.46.

Uniroyal's price favoritism to United and the resulting lower selling prices by United to consumers caused a tremendous decline in Skaines' business. Skaines, Brewer and local Uniroyal management had never seen tire prices as low as United was offering to tire buyers. More than 30 of Skaines' former customers began buying from United. The Plaintiff's lost profits on sales to these customers amounted to $3,476.07. Uniroyal's anticompetitive conduct resulted in Skaines losing his business and losing future profits and income in excess of $561,400 based upon Uniroyal's projection for his business. Brewer was also required to close his business.

I. Complaints to Uniroyal About the Price Discrimination Favoring Friend

Thomas M. Brewer, a former seven year employee of Uniroyal became a Uniroyal franchised dealer in Memphis in the fall of 1968. Skaines had encouraged Brewer to obtain the Uniroyal franchise because he thought Uniroyal had more to offer Brewer than other competitors in the tire business.

Brewer testified that United was selling tires in the Memphis market cheaper than he could buy the tires from Uniroyal's Memphis district warehouse. After United flooded the market with brochures, handouts and advertisements, Brewer complained to Uniroyal's district manager

and regional manager, that he, Skaines, WECO and others, (including Goodrich and Goodyear) were unable to compete with United's prices. Brewer requested that Uniroyal sell to him tires at United's price, but, he was advised that such purchase prices were unavailable.

Skaines also complained to Uniroyal's regional management about United's price advantage. Each manager denied any knowledge of United and merely encouraged Skaines to find customers that would pay higher prices for tires. Skaines requested the same buying arrangements, including the right to purchase the alleged "blems" that United was also advertising. The Uniroyal representatives denied the existence of any price-favored buying arrangement and denied that any "blems" were available since Uniroyal had such good quality control. Uniroyal's district representatives finally admitted the competitive problem existed and they were complaining to superiors about United flooding the Memphis market with so-called "blems" as late as February 28, 1970.

Friend was enjoying such favorable prices from Uniroyal that he began selling Uniroyal tires to Mohawk dealers in Atlanta, Georgia, who were reselling the tires at substantially lower prices than Uniroyal dealers in Atlanta were paying for tires at Uniroyal's Atlanta regional warehouse. Friend's sales of tires outside of the Memphis metropolitan market was considered by Uniroyal to be a violation of the agreement with Friend. Uniroyal had no other objection with the way Friend was selling tires or doing business. After discovering Friend's "backdooring" of the sale of tires in Atlanta, Uniroyal terminated its arrangement with Friend on March 25, 1970.

J. Skaines Attempt to Compete & Uniroyal's Takeover of the Market

Skaines attempted to meet United's competition by reducing prices and by trying to locate customers that did not know about United's prices. In the month of September,

1969, he experienced his largest volume in sales; but, he was cutting his sales prices to cost and he was still unable to meet United's competition. Skaines even attempted to make purchases from United through Uniroyal distributors.

In an effort to save his business, Skaines made an informal proposal, to Uniroyal's regional manager, to merge his business with WECO. The proposal was communicated to Dave Harris, the vice-president of Uniroyal's Allied brands division. As late as March 4, 1970, Uniroyal's regional manager was still requesting help from Harris to supply Skaines with the alleged "blems" or favorably-priced tires in order to meet United's competition in the market.

Although Skaines never missed a monthly payment to Uniroyal under the terms of the book balance agreement, Uniroyal demanded payment of the entire outstanding book balance of $26,000.00 to be paid on or before March 25, 1970. Because Skaines could not comply and keep his business operational, he assigned all of his accounts receivable and inventory to Uniroyal.

Uniroyal's Memphis WECO operation lost $16,900.00 during 1969 and it was operated at a loss for the entire three year period it had been in business. On April 6, 1970, WECO's manager requested authority from Uniroyal to pursue Skaines' customer accounts. WECO also hired Skaines' employee who then sold WECO's Gillette labeled Uniroyal tires to Skaines' customers who had formerly purchased the Peerless labeled Uniroyal tires from Skaines. Uniroyal's business performance at its WECO subsidiary improved after Skaines and Brewer were forced out of business and WECO hired Skaines' employee. Uniroyal made adjustments, i.e., returns for defects, on Peerless labeled Uniroyal tires purchased by Skaines' customers, by substituting Gillette labeled Uniroyal tires at the Uniroyal Memphis district warehouse and at WECO.

Brewer was forced to close his Uniroyal dealership in June, 1970. In 1974, the United States Court of Appeals for the Sixth Circuit affirmed a District Court jury's finding that Uniroyal's price-favoritism to United was in violation of the Robinson-Patman Act and awarded damages to Brewer. *Brewer v. Uniroyal, Inc.*, 498 F.2d 973 (6th Cir. 1974).

K. The Dealer's Damages

At trial, Respondent claimed and the jury awarded damages as a result of Uniroyal's anticompetitive conduct as follows:

	Amount Claimed	Amount Awarded
a. Loss of profits on sales to customers diverted to United	$ 3,476.00	$ 1,150.00
b. Price discrimination overcharges	22,293.46	16,969.00
c. Consulting fees paid to Friend	57,000.00	-0-
d. Loss of profit	336,400.00	205,200.00
TOTAL DAMAGES CLAIMED	$419,169.46	
TOTAL DAMAGES AWARDED		$223,319.00

Skaines claimed damages for loss of future profits rather than his loss of the going concern value of the business.

The District Court approved and trebled the jury verdict to $669,957.00 and the Court also awarded Respondent an attorney fee of $106,250.00. The United States Court of Appeals for the Sixth Circuit approved the District Court award; but the appellate Court remitted the special verdict for damages for loss of future profits from $205,200 to $30,000.00. The Petitioner, Uniroyal, has no basis for obtaining a writ of review by this Court.

REASONS TO DENY THE WRIT

I. THERE IS NO CONFLICT WITH THE DECISIONS OF THIS COURT.

A. Respondent did not claim and he was not awarded "automatic damages".

Uniroyal's Petition fails to qualify under this Court's rules governing review of decisions by a federal court of appeals. Rule 17, Rules of the Supreme Court of the United States. This case was tried and decided in accordance with the decisions of this Court. Uniroyal erroneously seeks to have this Court re-examine and re-weigh the evidence which was properly submitted to and reviewed by the jury.

Contrary to the assertion of Petitioner, Uniroyal did not raise any "automatic" damage rule objection to any jury instruction as required by Rule 51 of the Federal Rules of Civil Procedure. The trial Court did not even give an "automatic" damage instruction; instead, the Court properly instructed the jury,

> If you find that the Plaintiff has proven a violation of the Act, you will then be concerned with the issues pertaining to damages.
>
> In a case of this kind before a Plaintiff can recover he must prove in addition to the violation that he was injured in his business and that the injury proximately caused an *actual loss.*
>
> This statute requires proof of a causal connection between the antitrust violation and the injury to Plaintiff's business. In order for the Plaintiff to recover damages, it is not enough to show that he violated the law, but it is also necessary for the Plaintiff to establish by a preponderance of the evidence that the wrong done proximately resulted in ascertainable damages to its business and property. Plaintiff must prove that injury to its

> business was a *certain result* of the wrong done by Defendant, and that its damages were *definitely attributable* to the wrong.
>
> In the area of this matter of cause and proximate cause an injury or damage is proximately caused by an act or failure to act wherever it appears from the evidence in the case that the act or omission played a substantial part in the bringing about or *actually causing* the injury or damage. And that the injury was either a direct result or a reasonable probable consequence of the act or omission. (R. 950-951). (Emphasis supplied)

In *J. Truett Payne Company, Inc. v. Chrysler Motors Corporation*, —— U.S. ——, 101 S.Ct. 1923 (1981), this Court required that a Robinson-Patman plaintiff prove that:

(1) the defendant is a "wrongdoer" who has violated the Act; and,

(2) the plaintiff sustained "actual damages" proximately attributable to the violation of the antitrust laws. *Id.* at 1927 and 1930.

Payne was unable to prove that the challenged price favoritism had any effect on competition. He did not know if the favored-competitors passed on the allegedly lower cost to retail customers. The Chrysler dealer and his expert failed to offer any "documentary evidence" as to the effect of the discrimination on retail prices. *Id.* at 1928. Another major void in the proof in *Payne* was the dealer's inability to show any anticompetitive injury resulting in personal loss of sales or profits; instead, the dealer actually enjoyed greater profitability on new car sales than the allegedly price-favored competitors. *Payne* [101 C.S.] at 1928.

In compliance with the standard of proof required but absent in *Payne*, Skaines proved that:

(1) Uniroyal's national and Texas management recognized the detrimental affect Friend's "arrangement" would have on Uniroyal's existing dealers;

(2) Uniroyal's anticompetitive price favoritism to United resulted in United selling tires substantially cheaper in Memphis than Skaines, Brewer and local Uniroyal management had ever observed;

(3) Uniroyal's anticompetitive price favoritism to United resulted in United being able to sell at such low prices that Skaines, Brewer, WECO and others (including Goodyear and Goodrich, which even sold tires of unlike grade and quality) could not even compete;

(4) Uniroyal's own district and regional managers, as well as Skaines and Brewer, complained about Friends' destruction of competition in Memphis and Atlanta;

(5) Uniroyal's district and regional management requested competitive help for Skaines;

(6) More than thirty of Skaines' former customers were diverted to the price-favored United;

(7) Skaines was unable to compete against United even by lowering his selling prices to cost; and,

(8) Both Skaines and Brewer lost their businesses within several months of United's entry into the market.

Uniroyal was certainly an admitted "wrongdoer" which acted with knowledge aforethought when it granted United price-favoritism to conduct business in Memphis. Uniroyal's same price-favoritism to United has heretofore been held to be in violation of the Robinson-Patman Act in Brewer's case. *Brewer v. Uniroyal, Inc., supra.*

All damages and losses sustained by an injured party are recoverable under §4 of the Clayton Act if the damages are attributable to a violation of the antitrust laws. *Payne,*

supra; Perkins v. Standard Oil of California, 395 U.S. 642, 648 (1969).

Although Skaines lowered his prices to cost, he was still unable to meet United's prices. As a result of United's low retail prices to customers, Skaines lost more than thirty of his former customers. If Skaines had made these sales rather than United, he would have realized profits on these sales to former customers in an amount of $3,476.07. The jury awarded $1,150.00 in damages for this economic loss.

Although a Robinson-Patman plaintiff may not recover price differentials as "automatic" damages, Skaines proved that Uniroyal's price discrimination proximately caused him to pay illegally higher prices for tires of like grade and quality and thereby cause him to operate at an anticompetitively higher cost and overhead. He paid more to Uniroyal for tires of like grade and quality than United was required to pay; and he and Brewer were forced out of business.

During the period when Skaines and United were in direct competition, (July, 1969, through March, 1970), Skaines' average cost per tire was $6.46 more than Uniroyal's price to United for the same tires of like grade, quality and size. He purchased 3,461 comparable tires during this seven month period; consequently, his out-of-pocket cost of doing business was $22,293.46 more than United incurred. The jury awarded $16,969.00 for this item of damage that was proximately caused by Uniroyal's anticompetitive conduct.

In addition to injuring competition, Uniroyal's violation of the Act directly and proximately injured Skaines by causing him to pay monies illegally in excess of what free competition required. No request was made by Respondent for this item of loss to be awarded as "automatic" damages. Instead, the jury was correctly instructed to require the dealer to prove Uniroyal's violation

of the Act, the injury from the violation and any "actual" damages that he sustained which were directly and proximately caused by the violation.

Petitioner's reference to one sentence of the Amended Order of the lower Court which supposedly represents a departure by the Sixth Circuit from this Court's holding in *Payne*, is a text out of context. As the Court observed,

> The *Payne* decision states that damages are not presumed to result from a Robinson-Patman violation and, thus, "automatic" damages are not recoverable. It further holds that damage to a business is not, in and of itself, proof of a violation of §2(a) of the Robinson-Patman Act. Appendix 1, A-3 — A-4.

The jury was properly charged that there had to be a causal connection between the alleged violation of the Act and a resulting competitive injury sustained. *Perkins v. Standard Oil Co., supra.* In 1961, the Sixth Circuit adopted the "actual damage" rule as recently applied by this Court in *Payne. Kidd v. Esso Standard Oil Co.*, 295 F.2d 497 (6th Cir. 1961). As required by *Payne*, the Respondent proved that as a result of the Petitioner's violations of the Act, he lost: customers, sales, profits, his business and he had to operate at an anticompetitively higher cost than United. As appropriately noted by this Court in *Payne* when commenting as to the viability of a jury's reference to price overcharges as an item of damages, ". . . the issue is not so much the amount of damages as whether petitioner has in fact been injured by an antitrust violation." *Payne,* [101 S.Ct.] at 1930.

B. The jury's award for loss of future profits is consistent with the decisions of this Court.

Skaines' claim for damages for loss of future profits is based upon the projection prepared by Uniroyal's territory sales representative, account manager and district credit

manager, as well as, Skaines' business experience. Uniroyal's witnesses and the Respondent, as a former credit and sales manager for Uniroyal, agreed that the amounts reflected on the projection were fair and reasonable in light of their fifty-plus combined years of experience with Uniroyal tire dealerships. The projection was the basis for Skaines' selection of Uniroyal and his investment in the tire business.

In antitrust cases the comparable experience of others in a field is an acceptable method of proving damages. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 262-266 (1946). A mathematical projection based on the prior business of a plaintiff is a reasonable method of calculating damages even though it cannot be shown with mathematical precision. *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 346 F.2d 661, 666 (6th Cir. 1965).

If a projection is available and based on extensive experience from which sales and profits can be derived with a high degree of certainty, then it should be likewise available as credible evidence. If the figures on a projection prepared by experts in an industry are good enough for a person to invest his money and talents, then it should also be a reasonable source for consideration by the trier of fact.

Whenever Skaines was not hampered by Uniroyal's failure to provide inventory or adequate book balance, his business grew in its profitability and realized a normal profit growth until United entered the Memphis tire market. He operated at a profit for six out of the twenty months that he was in business, in spite of Uniroyal's failure to provide adequate inventory and growth, as well as, head-on competition with United.

From Skaines' experience with Uniroyal in credit, sales management and marketing with Uniroyal tire dealers, the profitability of his business had been unusual since profits had been so quickly realized. Skaines' quarterly

sales increased steadily and corresponded with his experience with other successful new Uniroyal dealers. However, when United entered the market, the dealership suddenly began to experience a reversal of its sales and growth trend in the third and fourth quarters of 1969 and the first quarter of 1970; when he was finally required to close his business.

When profits can be extrapolated from prior experience, they are recoverable even if prior experience only reveals net losses. *Westric Battery Co. v. Standard Elec. Co.*, 482 F.2d 1307 (10th Cir. 1973). The prohibition against assessing an uncertain amount of damages applies only where the fact of damages is uncertain, but not where the amount alone is uncertain. *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 562, 566 (1931). An antitrust plaintiff may prove his damages by reasonable estimate and he is not required to introduce direct and positive proof of the amount of damages. *Bigelow v. RKO Radio Pictures, Inc., supra* at 265.

If the defendant's own wrongful acts have caused some uncertainty in the mode of estimating damages, then justice and sound public policy require that the wrongdoer bear the risk of the uncertainty. *Bigelow, supra* at 265; *Story Parchment Co., supra* at 565. As observed by the trial Court, part of Skaines' difficulty in proving his case was "due to Defendant's [Uniroyal's] inability to furnish adequate records." Appendix 2f.

In addition to the jury's reference to the Uniroyal prepared projection for the award of loss of future profits, Uniroyal complains that the jury should not consider what duration of time Respondent would have continued to operate his business, but for Uniroyal's destructive antitrust violation. Uniroyal did not offer any evidence to establish any prospective termination of the dealership arrangement with Skaines. Instead, the record is without contradiction that Skaines intended to continue in business

for 25 years until he attained the age of 65.

The process of calculating the duration of profitability of a business for loss of future profits is not susceptible of precise formulation; rather, it is a jury question and the youth of a business alone should never justify severe restrictions upon the duration of damages. *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 46 (5th Cir. 1972), *cert. denied*, 409 U.S. 1077 (1972).

Mr. Justice Black observed,

> . . . when as here a young man's business is wiped out, root and branch, by a wrongdoer, the measurement of the victim's damages is not so simple a matter. This is true because no one can infallibly predict how long that business would have continued to grow and flourish or precisely how much the business would have been worth to him in 25 years. But certainly a fair and just legal system is not required by difficulties of proof to throw up its hands in despair and leave the sufferer's damage to be borne by him while the person who did the wrong goes scot free.

Simpson v. Union Oil Co. of California, 396 U.S. 13, 16 (1969) (Black, J., Concurring and Dissenting).

According to Uniroyal's projection, Skaines was to have income of $22,456 in the first year of business. The District Court instructed the jury to deduct the projected owner withdrawals of $9,000 per year as recognition of compensation for Skaines' services to the business. Consequently, the remaining claim for damages for loss of future profits based on the projection was $336,400, i.e., $13,456 x 25 years. The jury awarded Skaines $205,200 for this item of damages. This amount was well within the outer limit of the maximum range of reasonableness.

Uniroyal's proposition that the loss of future profits award represents an injury to the business and not to the

person is based on cases involving claims for the "going concern value" of a business and not claims for loss of future profit. *Albrecht v. Herald Co.*, 452 F.2d 124, 129 (8th Cir. 1971); *Simpson v. Union Oil Co. of California*, 411 F.2d 897 (9th Cir. 1969), *rev'd on other grounds*, 396 U.S. 13 (1969). The trial Court properly awarded judgment on the jury's special verdict. The Uniroyal projection, as well as, the business growth and experience of Skaines provided the jury with the relevant data to project his loss of future profits.

II. THE JURY, THE TRIAL COURT AND THE SIXTH CIRCUIT CORRECTLY CONCLUDED THAT THE PEERLESS LABELED UNIROYAL TIRES SOLD TO SKAINES AND THE UNIROYAL, GUARDIAN, AND GUARDIAN PREMIUM LABELED UNIROYAL TIRES SOLD TO UNITED WERE OF LIKE GRADE AND QUALITY.

A. Like grade and quality is a fact issue.

The issue of like grade and guality is a fact question that cannot be resolved as a matter of law if there are disputed facts in evidence. *Checker Motors Corp. v. Chrysler Corp.*, 283 F. Supp. 876, 889 (S.D. N.Y. 1968), *aff'd*, 405 F.2d 319 (2nd Cir. 1968), *cert. denied*, 394 U.S. 999 (1969).

B. There is no consumer preference as to the grade and quality of Uniroyal's tires.

All of the Uniroyal tires involved in this controversy had the same Department of Transportation (DOT) number and all of the tires were manufactured by Uniroyal. Because Uniroyal only advertises the Uniroyal brand of tires, the Petitioner stipulated that,

> . . . the consumer has no basis for developing a definition of like grade and quality between the Uniroyal product line as opposed to the Peerless. (R. 15).

Consumers were not provided with any information to enable them to distinguish between the Uniroyal tires. Consumers did not demonstrate any preference as to the various Uniroyal labels. Price is the most important competitive consideration to a tire consumer.

Commodities are considered to be of like grade and quality where physical and chemical properties and the quality of the products are the same, even though some are marketed under a producer's nationally advertised brand and others under private brands. Labels do not differentiate products for the purpose of determining grade or quality, even though one label may have more consumer appeal and command a higher price in the marketplace. 15 U.S.C. §13(a). *F.T.C. v. Borden Co.*, 62 F.T.C. 130, *order set aside*, 339 F.2d 133 (5th Cir 1964), *rev'd and remanded*, 383 U.S. 637, 639-640 (1966); *Continental Baking Co. v. Old Homestead Bread Corp.*, 476 F.2d 897 (10th Cir. 1964). The hypocrisy of Petitioner's case is that the nationally advertised Uniroyal label was sold to United for up to a fifty percent lower price than the Peerless labeled Uniroyal tires were sold to Skaines.

Uniroyal erroneously refers to the *Universal Rundle* decision by the F.T.C. as controlling authority for the facts in controversy. *In re Universal Rundle Corporation*, 65 F.T.C. 924 (1964), *rev'd on other grounds*, 352 F.2d 831 (7th Cir. 1965), *rev'd*, 387 U.S. 244 (1967), *decision on remand*, 382 F.2d 285 (7th Cir. 1967). In *Universal Rundle*, there was a distinct consumer preference for bathtubs which were different in height, width, surface enamel area and water level. The F.T.C. concluded that the bathtubs were not of like grade and quality. *Universal Rundle* is distinguishable to the case at issue, in that there are no such marked physical differences between the tires as to even be discernible to the consumer, much less result in any consumer preference. In distinction to consumer preference for the size of a bathtub, the different labeled Uniroyal

tires yielded no difference in performance.

The Robinson-Patman Act requires the goods be of "like" grade and quality, not that the goods be of "identical" grade and quality. 15 U.S.C. §13(a). In determining whether goods are of like grade and quality, the trier of fact is entitled to consider "insubstantial physical differences" as not exempting products from the Robinson-Patman Act, if the items "give substantially identical performance." *Bruce's Juices v. American Can Co.*, 87 F. Supp. 985 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919 (5th Cir. 1951), *modified*, 190 F.2d 73 (5th Cir. 1951), *cert. dismissed*, 342 U.S. 875 (1951). (Cans which varied in size of 3 3/4" and 3 7/8" were of like grade and quality since each can gave the packer substantially identical performance.) Shower curtains which merely differed in pattern were of like grade and quality. *Joseph A. Kaplan & Sons, Inc.*, 63 F.T.C. 1308, 1347-1348 (1963). Tires of different tread design but of the same basic construction were of like grade and quality. *Goodyear Tire & Rubber Co.*, 22 F.T.C. 232 (1936), *rev'd on other grounds*, 101 F.2d 620 (6th Cir. 1939), *cert. denied*, 308 U.S. 557 (1939). Coffee in larger size "institutional pack" was of like grade and quality with the regular home use pack even though there was an extra type of coffee bean used in the institutional pack and a slight variance in the roasting process. *General Foods Corp.*, 52 F.T.C. 798 (1956).

C. Former Uniroyal personnel and dealers confirmed that the tires were of like grade and quality and completely interchangeable.

Skaines had been trained by Uniroyal in the tire business. Uniroyal did not advise its dealers or sales personnel of any differences between the Peerless, Uniroyal, Guardian and Guardian Premium labeled Uniroyal tires. Instead, Uniroyal's sales force and dealers understood that the tires were the same grade and quality.

Some of the tires had some "minor cosmetic differences" consisting of the respective name plate on the side of the tire and some had a slight alteration in the tread pattern. There were no performance or functional differences in the tires. Each of the comparable tires were interchangeable. After Skaines' business closed, Uniroyal made adjustments with his former customers by replacing any defective Peerless labeled tires with the Gillette labeled tires at the Uniroyal Memphis service department and at WECO. Yet, Uniroyal alleges that the customers with Peerless labeled tires did not have a "consumer warranty".

There were no differences in competition between the lines of the different labeled Uniroyal tires. Competition in the tire business is based upon "price". Skaines, WECO and United solicited the identical consumer market and each operated in the same WECO-wholesale format.

Brewer observed the manufacture of tires at Uniroyal's Detroit plant. He recalled that the different labeled tires all come out of the same "batch of tires". (R. 511). Brewer concluded that the tires just had a different name plate in the mold.

Brewer and Skaines identified the tires sold to Skaines and United as being of like grade, design, performance and quality. Brewer related that each of the tires had a different name plate and some may have had different tread patterns. Most of the tread patterns were very similar and any differences were very negligible.

D. The expert testimony confirmed Uniroyal's different labeled tires were of like grade and quality and had virtually identical physical properties and engineering specifications.

Theodore J. Reinhart, Jr., a professional tire design engineer was formerly employed by B. F. Goodrich in the tire development department with responsibility for developing new materials and new designs for improved

performance tires. After six years with Goodrich, he has continued to be employed by the United States Air Force in tire development and tire engineering. Reinhart has five tire patents and two tire patents pending. He has authored technical articles and teaches materials engineering at the University of Dayton. He has observed tire manufacturing at several plants, including Uniroyal. He spent more than thirty days in Uniroyal plants observing the manufacture of passenger tires for the Air Force.

The primary technique of making tires is a "drum building" process. The tire builder puts together the various components, (i.e., reinforcing plys, liner, steelwire wraps, reinforcement and chafing strips), to form on mechanical equipment a raw, uncured "green" tire. The green tire is then cured by one of three methods, which can include the use of a tire mold. The primary function of a tire mold is to give cosmetic appearance to the sidewall and tread.

Reinhart described the engineering factors which should be examined when considering whether tires are of like grade and quality. After reviewing Uniroyal's 40,000 pages of microfilmed engineering specifications, Reinhart found that the Peerless labeled and Uniroyal, Guardian and Guardian Premium labeled Uniroyal passenger tires had absolutely no functional or performance differences. The engineering specifications were "virtually identical".

In one of the groups of comparable tires, Reinhart found no changes or variations in any of the materials or construction on the Peerless and Gillette Sprint GT. The Guardian Premium wide sport even had the same mold designation as the other two and the same construction throughout except for the fact that the Guardian had a polyester cord, which did not result in any functional or performance difference whatsoever between the tires.

When comparing the engineering specifications information on each of the tires within the third through the

seventh groups of tires, he concluded that each of the Peerless labeled tires purchased by Skaines were "identical" to the United purchased Uniroyal and Guardian labels in their respective engineering and construction features, as well as, performance and functional capabilities.

In the eighth group of tires, Reinhart found the Uniroyal tires sold to Skaines and United to be virtually identical in material and construction features. The Peerless Parkway Mud and Snow, the Uniroyal Patrol and the Guardian Premium Winter tire, were also identical in functional and performance capabilities.

There is a general custom and practice among tire manufacturers to have the same tire built under a different brand name. Uniroyal's tire reliability engineer, William Briscoe, admitted that Uniroyal does merely change plates and use the same molds for the various brands on "small production type runs". He admitted that there is a custom within the tire industry wherein manufacturers put on the same tire under different labels, e.g., Firestone 500 was labeled as a tire for Shell and K-Mart.

Briscoe attempted to establish physical distinctions between many of the comparable tires. Reinhart related that Briscoe's alleged distinctions, (i.e., 2.5 degree difference in ply angles, groove depth, finished angles of cord), were merely superficial manufacturing tolerances which did not result in any quality or performance differences between the tires.

In reply to Briscoe's reference to Uniroyal's engineering specifications for net to gross and tire weight, Reinhart stated that these items are,

> . . . so much a function of the load the tire is under, and the inflation pressure that the tire has, that it is variable . . . it doesn't affect the tire's performance . . . in determining tire comparability.

Although Briscoe claimed that most of the tire specifications he reviewed were cured in different molds, Reinhart testified that there would be no effect on the construction and engineering design of the tire by the use of different molds. Tires can have the same or similar design even though they have a different mold profile. Tires with different construction specifications can be cured in the same mold and it is a common practice at most tire companies. Any changes in the molds would merely produce a non-functional cosmetic change with no effect on performance or consumer preference.

Because Reinhart did not have an opportunity to review the Uniroyal microfilm specifications on the comparable truck tires, Briscoe tried to distinguish this group. Reinhart admitted that the treads of two of the truck tires shown to him during the trial appeared to be different; however, the problem Uniroyal had in convincing the jury that these were not comparable tires was that the same truck tires were represented to Uniroyal management in promotional literature as being the same tire even though each had a different label.

Reinhart's opinion was that all of the engineering factors, such as cord, angle and material, stock for the tires were almost identical and that there were no differences in performance capabilities. Reinhart noted no performance differences as to performance capabilities of the tire treads to which Briscoe alluded.

Briscoe admitted that he had no knowledge of consumer preference and no knowledge as to what technical information Uniroyal gives to customers. Skaines testified that in 13 years of employment and association with Uniroyal, he had never heard of the terms used by Briscoe, (e.g., net to gross, tread weight, tread ratio, groove depth), as information used by Uniroyal or customers in identifying or evaluating a tire. Even though Briscoe was Uniroyal's tire performance and reliability engineer, he was unable to

state that any of the comparable tires had better performance or inferior performance than any of the others.

E. The "alleged blem" Uniroyal, Guardian and Guardian Premium labeled Uniroyal tires sold to United were of like grade and quality to the comparable Peerless labeled Uniroyal tires sold to Wyatt Skaines.

Uniroyal, as other tire manufacturers, marketed tires as "blems", also known as Group IV tires. Tires sold as "blems" may, or may not, have a minor cosmetic blemish. Tires are marketed as blems in order to stimulate sales and dispose of factory overruns of first quality tires, also known as Group I tires. Each local Uniroyal warehouse kept a branding iron available to mark Group I tires as "blems". Any tires sold as blems which did have a minor cosmetic blemish would not normally even be visible to the consumer.

Uniroyal insists that a major portion of the tires on which United received price favoritism were "blems" which were not of like grade and quality to the tires sold to Skaines. The same defense was raised unsuccessfully in the *Brewer* case. *Brewer, supra* at 975. In other litigation involving alleged Robinson-Patman Act violations by Uniroyal which included sales of blemished tires, it was noted that "blems" are first quality tires with only cosmetic defects. *Uniroyal, Inc. v. Jetco Auto Service, Inc.*, 461 F. Supp. 350, 353 n.2 (S.D. N.Y. 1978). United's sales invoices reflect that on numerous sales of alleged "blems" there was a notation, "substitute first quality at blem price."

Brewer testified that he purchased tires from United and that Group I tires (also known as "first quality tires"), were oftentimes substituted for "blems" at the blem price. The blems that Brewer purchased from United were not different in quality or grade level from the comparable first line Peerless labeled tires that he formerly bought from Skaines. "[P]erformance-wise, looks and everything",

they were the same tire. (R. 490).

Uniroyal discriminated against Skaines in violation of the Robinson-Patman Act on the alleged "blems" in both price and by its refusal to sell him "blems". United was sold blems at the 500-lot price less a five percent (5%) discount plus an additional fifty percent (50%) discount greater than Skaines.

The effect on competition by Uniroyal giving one competitor first quality tires at blem prices is that consumers were rushing to get a deal. Skaines related that,

> . . . [a] blem tire is a plum offered to a tire dealer. A blem tire has no difference in quality, or ability, or performance to the first tire. (R. 379, 412-413).

Skaines and Brewer attempted to buy the alleged "blems" from Uniroyal. They were advised that Uniroyal's quality control was so good that Uniroyal did not produce any blems and none were available. Uniroyal's district manager over Skaines, noted the flooding of blems in the Memphis market by United and requested that Skaines be given an opportunity to receive "blems".

In comparing the various tires in issue, Reinhart related that there would be absolutely no difference in the grade and quality of the respective tires by designating one as a blem versus a Group I tire. At the time of the Trial Court's consideration on the Defendant's Motion for Summary Judgment at the conclusion of all the proof, the Court concluded,

> . . . If I were the jury, I wouldn't have any trouble at all on like grade and quality. It depends on who you ask. (R. 936).

The issue of like grade and quality was certainly a fact issue for the jury. This Court should not exercise jurisdiction to engage in a re-weighing process of the jury's findings as approved by the trial Court and appellate Court on the issues of like grade and quality.

III. THE COURTS BELOW PROPERLY AWARDED AND APPROVED AN ATTORNEY FEE IN THE AMOUNT OF $106,250.00.

Section 4 of the Clayton Act, 15 U.S.C. §15, provides that the injured antitrust claimant is entitled to recover threefold the damages sustained and the cost of suit, "including a reasonable attorney's fee". The establishment of the exact amount of attorney's fees is within the discretion of the trial court. *Volasco Products Co. v. Lloyd A. Fry Roofing Co., supra* at 667.

This litigation was filed in 1972 and was not disposed of by trial until June, 1979. Extensive discovery and trial preparation took place during the seven year period. In 1974 Uniroyal had been found liable for damages as a result of this anticompetitive conduct with Friend; yet, the tire manufacturer elected to defend many of the same issues that were raised in the *Brewer* case. *Brewer v. Uniroyal, Inc., supra.*

Affidavits by Skaines' attorneys reflected time in excess of 925 attorney hours devoted to the pre-trial preparation and trial of the case. The Plaintiff requested an attorney fee of $110,000.00. Affidavits by members of the American, Tennessee and Shelby County Bar Associations, reflected opinions of a reasonable fee to be in amounts of $116,000.00 to $135,000.00. The trial Court noted that these affidavits were from "leading attorneys of the Memphis and Shelby County Bar Association who were not participants in the case." Appendix 3, A-13 — A-14.

Based upon the affidavits by the reviewing attorneys, the District Court's familiarity with the litigation for seven years, and the jury verdict, the Court concluded that a reasonable fee for the legal services would be $125,000.00. The Court reasoned that there was some duplication of effort of legal services as a result of the Respondent changing attorneys; consequently, fifteen percent of the

$125,000.00 fee was discounted to a total fee award of $106,250.00.

The trial Court's attorney fee award was approved by the Sixth Circuit. Uniroyal complains that since the Court remitted part of the damage award, the attorney fee award should likewise be remitted. This argument overlooks the fact that the Appellate Court did not award any additional fees for the post-trial appellate services, as well as, the Court's implied recognition that the fee award was reasonable and did not constitute an abuse of discretion by the District Court. *Volasco Products v. Lloyd A. Fry Roofing Company, supra* at 667.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari filed by Petitioner, Uniroyal, should be denied.

Respectfully submitted,

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Appendix

APPENDIX "1"

NO. 80-1329

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

J. WYATT SKAINES, individually and d/b/a
WYATT TIRE DISTRIBUTORS ..... *Plaintiff-Appellee*

v.

UNIROYAL, INC., formerly UNITED
STATES RUBBER COMPANY ..... *Defendant-Appellant*

AMENDED ORDER

(Filed January 22, 1982) John Hehman, Clerk

BEFORE: EDWARDS and MARTIN, *Circuit Judges and* FEIKENS, *District Judge**

Uniroyal, Inc. ("Uniroyal"), defendant below, appeals from a jury verdict of $223,319 for price discrimination in violation of §2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a). This verdict was trebled pursuant to §4 of the Clayton Act, 15 U.S.C. §15, and with the award of attorneys' fees in the amount of $106,250, the total recovery of Skaines, plaintiff below, was equal to $776,207; judgment was entered thereon by the United States District Court for the Western District of Tennessee.

On June 24, 1968, Skaines entered into a "Peerless Distributor Franchise Agreement" with Uniroyal concomitantly with a book balance plan.** Prior to entering the agreement with Uniroyal, Skaines drew up a worksheet with three sales representatives of the tire company to

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*The Honorable John Feikens, Chief Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

**Under this plan, Skaines was required to contribute $10,000 to the venture and Uniroyal supplied a $20,000 tire inventory.

project expenses and profits for the business for the year between July 1, 1968 and June 30, 1969. The "Financial and Operating Budget" anticipated a total annual income before taxes for the first year of $22,456.

The venture did not succeed and this lawsuit ensued in which Skaines claimed price discrimination by Uniroyal as a cause. He claimed tires were being sold by Uniroyal to him at a higher price than to United Tire & Rubber Company ("United"), another tire distributor in Memphis. Upon trial the jury concluded that the tires that were supplied to United were of like grade and quality as those supplied to Skaines, albeit they were sold in some instances under different labels, and found price discrimination. A verdict was returned for Skaines.

Uniroyal moved for judgment notwithstanding the verdict, or in the alternative for a new trial. The standards for review of the motions are similar but not identical. To determine if a judgment notwithstanding the verdict is proper, the evidence must be viewed in the light most favorable to the party that secured the jury verdict and reasonable minds must not differ as to the conclusions to be drawn from the evidence. *Woodruff v. Tomlin*, 616 F.2d 924, 934 (6th Cir.), *cert. denied*, 449 U.S. 888 (1980); *Gilham v. Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976). In this case, there was sufficient question as to whether the tires were of like grade and quality to require a determination by a trier of fact. The decision of the District Court denying Appellant's motion for judgment notwithstanding the verdict is affirmed.

On appeal, the reviewing court must only reverse the District Court's denial of a new trial if it appears that that court abused its discretion. *Duncan v. Duncan*, 377 F.2d 49 (6th Cir. 1967). In this instance, the District Court con-

cluded that there was overwhelming evidence from which a jury could conclude that there had been a violation of the Robinson-Patman Act, even though it was of very short duration. Since the District Court had the benefit of hearing testimony that was presented in this case, as did the jury, we are not inclined to overturn its ruling that the verdict was not against the great weight of the evidence. Nor do we find error in the jury instructions pertaining to the element of "like kind and quality." The decision of the District Court denying Appellant's motions for a new trial on these issues is affirmed.

Having found liability for a violation under §2(a) of the Robinson-Patman Act, we turn to the question of damages. The jury awarded Skaines, in special verdicts, $1,150 for diverted sales, $16,969 in price differentials, and $205,200 in lost future profits. Appellant contends that the recent United States Supreme Court decision, *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 49 U.S.L.W. 4516 (May 18, 1981), limits a plaintiff's recovery to actual damages. We do not agree. The *Payne* decision states that damages are not presumed to result from a Robinson-Patman violation and, thus, "automatic" damages are not recoverable. It further holds that damage to a business is not, in and of itself, proof of a violation of §2(a) of the Robinson-Patman Act. We interpret *Payne* to mean that proof of injury must be submitted from which, under proper instructions, a jury may find damage. Such an award may perhaps not be in the actual dollar amount of damage suffered, but because it is based on proof of injury and has been specifically found to be damage by the jury, cannot be characterized as automatic. A jury verdict so based is consonant with *Payne*. In so holding, the court in *Payne* relied on cases in which future profits were awarded as the result of Sherman Act violations and looked to the evidence presented by Payne in support of his claim of future profits.

The concept of recovery for lost profits is not without precedent. The statute that provides for recovery of treble damages does not distinguish between Sherman Act violations and Robinson-Patman Act violations. 15 U.S.C. §15, Clayton Act §4. An individual who is forced to close his business may recover lost future profits if he can show that the defendant's antitrust violation was the reason that the business was damaged. *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 862 n.28 (5th Cir. 1981); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 45-47 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972); *Farmington Dowell Products Co. v. Forster Mfg. Co.*, 421 F.2d 61, 81 (1st Cir. 1970). However, while the amount of damages is not subject to a rigorous degree of proof, *Payne, supra*, at 4519; *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123-24 (1969); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 561-66 (1931), a plaintiff cannot be awarded damages that are purely conjectural and speculative. *Bigelow, supra*, at 264; *Lehrman, supra*, at 46. The problem that we face in this case is similar to that faced by the courts in *Farmington Dowel, supra*, at 81, *Lehrman, supra*, at 45, and *Hanson v. Pittsburg Plate Glass Industries, Inc.*, 482 F.2d 220, 227 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974). In all instances, the jury was asked to speculate on the length of time that a plaintiff would have had a thriving business in the absence of the antitrust violation when the evidence only showed that the plaintiff lost money during the entire time of his venture. In the case before us, we are of the opinion that the amount of the jury award is not sufficiently supported by the evidence. The only data presented by Skaines in support of his claim for future profits is that contained in the Financial and Operating Budget for the year 1968-69 and his statement that he expected to stay in business until he retired 25 years later at the age of 65. The fact that Skaines contended that the business realized

sales greater than $25,000 for the first year of business in the face of income tax returns that showed a net loss for the two fiscal years that he was in business does not help his position. Although we do not substitute our judgment for that of the jury, the paucity of the evidence to support such a large verdict is apparent. For these reasons, we remand to the District Court for entry of an order of remittitur. Unless Appellee agrees to remit $525,600 within thirty days of the entry of the order, the District Court should grant a new trial limited to the issue of damages. This finding means that the Appellee is awarded in specific damage for diverted sales $1,150; in specific damage for price differentials $16,969; and in specific damage for lost future profits $30,000 — all totalling $48,119. When the damages are trebled, Skaines will be entitled to receive $144,357 in damages and $106,250 attorneys' fees.

Accordingly, the decision of the District Court is affirmed in part and reversed and remanded in part for actions consistent with the decision of this court on damages.

ENTERED BY ORDER OF THE COURT.

/s/ John A. Hehman, Clerk

APPENDIX "2"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

J. WYATT SKAINES, d/b/a
WYATT TIRE DISTRIBUTORS ..... *Plaintiff*

vs. No. C-72-216

UNIROYAL, INC., formerly
UNITED STATES RUBBER CO. ..... *Defendant*

RULING ON DEFENDANT'S MOTION FOR JUDGMENT N.O.V. OR A NEW TRIAL OR REMITTITUR

(Filed February 22, 1980)

This ruling pertains to the post-trial motions in this antitrust case brought pursuant to the Robinson-Patman Act wherein the jury rendered verdicts in favor of the plaintiff in the total amount of $223,319. Plaintiff seeks to have that sum trebled, and the defendant by its post-trial motion seeks to have a judgment notwithstanding the verdict, a new trial, or a remittitur.

Grounds I, II, and III attack the amount and weight of the evidence, with Ground III being based upon a charge of a verdict so excessive as to indicate prejudice on behalf of the jury. This Court concludes there is evidence to support the jury's findings. In fact the jury's verdict was substantially less than the amount contended for by the plaintiff.

Ground IV of defendant's motion is based upon a contention that the Court erred in not granting a mistrial because the plaintiff "radically changed" his characterization of his alleged damages and the amount and basis of calculating the same. This contention by the defendant is

completely contrary to the record in this cause. The defendant could have been aware of the plaintiff's proposed method of calculating damages as early as December 1, 1978. The defendant obtained a continuance of this matter in January 1979, allegedly for the purpose of carrying out discovery of the plaintiff's theories of damages. The defendant took no steps to determine the method of the plaintiff's calculation. Plaintiff's calculation was based upon the figures generated from the defendant's own records that reflected a substantial difference in prices given to the favored United Tire Company as against the prices extended to the plaintiff. The objection which the defendant raised at the time of the trial of the cause was that it would not have an opportunity to cross-examine the plaintiff about this calculation. In response to the defendant's request, the Court was willing to reopen the proof. The defendant further had its methods and systems analyst, Jack Hance, continuously available for assistance to attempt to develop any alleged rebuttal proof.

The defendant further claims as error Number V on the part of the Court, allowing the plaintiff to reopen his proof regarding price differentials. The Court's direction to the plaintiff to reopen the proof was as a result of the defendant's claim that the trier of fact would not be able to properly discern the evidence that had already been introduced. In the Court's discretionary authority to obtain justice and fairness in the trial, it directed that the plaintiff reopen its proof to cut down on the amount of the claim for price discrimination to the period wherein the alleged favored customer was in competition with the plaintiff.

Grounds VI through X allege errors of omission and commission on the part of the Court in the matter of the Court's instructions to the jury with regard to the troublesome principle of like grade and quality. At the trial and prior to the jury instructions considerable discussion and

argument was devoted to the topic of like grade and quality. In addition to the problems common to most products, the automobile tire industry has its own pecularities such as the industry practice of selling "blemished" tires for reduced prices and the practice by the manufacturer of designating some regular tires as blemished in order to sell them quicker or to give a particular customer a favored position.

There was an additional problem peculiar to the proof in this case concerning truck tires. In some measure due to the defendant's tardiness in furnishing information, plaintiff's expert was not able to make some pretrial comparisons for the matter of truck tires. However, in the opinion of this Court, that went to the weight of the expert's testimony.

This Court is of the opinion that it instructed the jury in accordance with the applicable law in the light of the issues presented by the proofs offered.

Grounds XI, XII, and XIII allege errors of the Court with regard to the Court's rulings and jury instructions in the matter of how the amount originally claimed by plaintiff as compensation for his services was eliminated from the claimed amount of future lost profits and the corollary item of plaintiff's earnings in another field after his tire business was closed.

This Court required the plaintiff to remove from his claimed annual lost profits the sum of $9,000 which had been inserted in projections prepared or approved by defendant personnel as appropriate compensation for the services to be rendered by the plaintiff to the tire dealership. This reduced the claimed net profit and hence the projected loss of future profits. This was the Court's attempt to have the jury determine the lost profits exclusive of the value of plaintiff's personal efforts because he had moved into another means of earning a living.

As Ground XIV, defendant contends that the Court erred in failing to instruct the jury that any verdict it might award would be trebled. The defendant argued this very same position during the time of trial and the Court ruled that there is no affirmative responsibility to mention trebling to the jury.

Ground XV charges that the Court erred as a matter of law because it allowed the jury to speculate as to the amount of plaintiff's damages in all the categories submitted to them: (1) lost profits on sales diverted from plaintiff; (2) differentials in prices the defendant charged United Tire and Rubber Co. versus the prices charged plaintiff; (3) plaintiff's lost future profits. This contention of the defendant is the same as there being a lack of evidence to support any verdict which awards damages.

(1) The jury found, pursuant to the interrogatory submitted, that the loss of profits on sales to customers during the period covered by the lawsuit were, in fact, proximately caused by the illegal price discrimination of the defendant. The plaintiff offered testimony that his basis for a high sales volume in September 1969 was the result of his willingness to lower his prices in order to compete with the prices extended by the defendant to its favored customer, United Tire Company. The jury's award for this item was substantially below the proof relied upon by the plaintiff for this category of damages.

(2) In support of its attack on the damages based upon price differentials between the prices charged plaintiff and United Tire, the defendant has filed an affidavit of a paralegal, Victoria S. Baird, that purports to show that some of plaintiff's proof in this regard was inaccurate. This attack pertains to the proof that was offered when plaintiff was allowed to reopen the proof in order to present proof of a lesser amount of damages in the light of the Court's ruling on some of the proof.

Upon reopening of the proof, plaintiff testified that between July 25 and October 1969 he purchased 2,579 tires for $41,527.15, an average of $16.10 per tire; that United Tire and Rubber Co. purchased 5,645 tires for $53,751, an average of $9.52 per tire; and that plaintiff was claiming as damages the difference between the aforementioned average prices, $6.58 per tire, times 2,579 tires, or a total of $16,969. The jury awarded this amount as price differential damages.

In some respects the argument made from Mrs. Baird's affidavit is inaccurate and irrelevant. Otherwise, the inferences presently asserted are arguments which should have been presented to the jury.

(3) This attack is open upon the $205,000 portion of the verdict, which the jury found to be based upon loss of future profits. The attorney for the defendant argues that this award is speculative and excessive in that it is based upon a business that closed after 21 months, during which period there was never an annual profit. While this Court agrees that this is a substantial verdict, the Court believes that the antitrust law provides that the loss of future profits is an allowable element of damages.

Initially, the plaintiff claimed $561,400 in damages for loss of his profits from the expected operation of the business for 25 years. This was based upon a projection of estimated expenses, sales, and profits prepared by knowledgeable officials of the defendant company and the plaintiff who had ten years of employment with defendant and other tire companies. This projection was made prior to the commencement of the operation of the violated dealership. The projection included $9,000 per year for the plaintiff, who was projected to be the owner-manager. Because the plaintiff has established himself in another type occupation the Court ruled that $9,000 per year should be removed from this part of plaintiff's damage claim.

After that claim was removed, the plaintiff's remaining total claim for loss of future profits was $336,000. Therefore the $205,000 represents a further downward adjustment of the claim by the jury, which could have been based upon a number of different items such as some of the plaintiff's actual financial data, including profits for some months, or the value of money received now for loss of profits in the future.

This Court finds no basis for setting aside nor reducing this verdict.

Grounds XVI, XVII, XVIII, and XIX are also based upon claimed errors in the portion of the judgment based upon the damages awarded by the jury for the loss of future profits. These are, respectively, claims by the defendant of no showing of actual damages, the verdict is duplicative with damages for losses on diverted sales, the verdict was upon mathematically erroneous calculations and the jury awarded too much money for the loss of future profits for a business that operated this short length of time and that had as little capital as the plaintiff's tire business had. As the Court heretofore indicated, the antitrust law recognizes loss of future profits as an element of damages. In this case there was exceptionally strong evidence of a violation of the Robinson-Patman Act, albeit of short duration. The case was a difficult one for the plaintiff to prove, due to defendant's inability to furnish adequate records. This Court believes that the matter was submitted to the jury in accordance with the law in the light of the evidence offered.

IT IS THEREFORE ORDERED that the motion of the defendant for a judgment notwithstanding the verdict or a new trial or a remittitur is hereby overruled.

ENTER: This 21st day of February 1980.

/s/ Robert M. McRae, Jr., Judge
United States District Court

APPENDIX "3"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

J. WYATT SKAINES, individually and d/b/a
WYATT TIRE DISTRIBUTORS ..... *Plaintiff*

vs. Civil Action No. C-72-216

UNIROYAL, INC., formerly
UNITED STATES RUBBER CO. ..... *Defendant*

ORDER ON MOTION OF DEFENDANT FOR RECONSIDERATION

(Filed April 19, 1980)

On February 22, 1980, this Court filed a ruling on defendant's Motion for Judgment N.O.V. or a New Trial or Remittitur and its separate Order Awarding Attorneys' Fees, Statutory Damages, and Judgment on the Verdict. On March 6, 1980, the attorneys for the defendant filed a Motion of Defendant for Reconsideration of Court's Ruling and Order to Alter or Amend the Judgment. The motion seeks an alteration of both of the Court's post-trial orders referred to above.

The portions of the motion which attack the Court's failure to give the defendant a Judgment N.O.V., a new trial, or remittitur merely reargue the position that the Court has faced many times in this troublesome case concerning the loss of future profits which form the basis of an award by the jury of $205,200. For the reasons previously stated, this Court is unwilling to alter its previous ruling. The Court further finds that the motion raises no new issues on that point.

A portion of the motion which addresses itself to the attorneys' fee question first asserts that the hearing on the attorneys' fee question was inadequate. As this Court heretofore noted, the Court felt that the fee question should not be ruled upon at the time there was an oral hearing for a motion for a Judgment N.O.V.; however, the Court noted that the Court reserved the right to rule on it. The Court felt that there was adequate evidentiary material in the record to support the fee award. The defendant saw fit not to rebut that prior to the hearing. The Court will take into consideration matters called to the Court's attention in the motion.

Counsel for the defendant assert that the Court failed to take into account by deducting a portion of the time devoted by plaintiff's counsel to the case because the plaintiff did not prevail on all issues such, as those pertaining to the consulting fees paid Harold Friend and the WECO issues. In the matter of law applicable to awarding attorney's fees in civil rights cases, the Court of Appeals for the Sixth Circuit has noted that Congress has indicated that those fees should be similar to those awarded in other types of equally complex federal litigation such as antitrust cases. *Northcross v. Board of Education, Memphis City Schools*, 611 F.2d 243, 233 (C.A. 6th 1979). In that case the Court noted that was improper to cut the fee claim because counsel did not prevail on all issues. The Court noted that plaintiff was a prevailing party and that his attorneys were allowed "compensation for hours expended on unsuccessful research or litigation, unless the positions asserted are frivolous or in bad faith". *Ibid.* at 636.

While it is true that the Court did not require counsel to file a detailed accounting as to dates worked and the nature and number of hours worked on each date, the Court does note that affidavits were filed from leading attorneys of the Memphis and Shelby County Bar Associa-

tion who were not participants in the case. Also there were affidavits from all of the participating attorneys. The amount of the award was not at the highest proof offered. Furthermore it must be realized that the attorneys' fees were contingent and that the amount of recovery was $669,957.

This Court is of the opinion that the time has come to terminate this case at the trial level. The Court therefore concludes that the motion should be overruled in all respects.

IT IS THEREFORE ORDERED that the Motion of the Defendant for Reconsideration of Court's Ruling and Order and to Alter or Amend the Judgment is hereby overruled.

ENTER: This 9th day of April 1980.

/s/ Robert M. McRae, Jr., Judge
United States District Court